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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PACIFIC GAS & ELECTRIC COMPANY,

Plaintiff and Respondent,

v.

CALIFORNIA DEPARTMENT OF TRANSPORTATION,

Defendant and Appellant.

E029446

(Super.Ct.No. BCV3566)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. John P. Vander Feer, Judge. Reversed.

Bruce A. Behrens, David R. Simmes, Peter A. Saporito and Robert W. Vidor for Defendant and Appellant.

Sedgwick, Detert, Moran & Arnold and Hall R. Marston for Plaintiff and Respondent.

Defendant and appellant California Department of Transportation (Caltrans) appeals an inverse condemnation judgment in favor of plaintiff and respondent Pacific

Gas & Electric Company (PG&E). Caltrans made improvements to existing protective dikes, designed to prevent floodwaters from washing out a highway. PG&E argued that the modifications to Caltrans's flood protection dikes would increase the quantity, speed and destructive force of floodwaters flowing over land under which PG&E has built a pipeline. PG&E was required to protect its pipeline from the increased risk of floodwater damage, and incurred $536,426.23 in costs to install protective mats and other measures.

Caltrans argues that the trial court erred in finding that the increased discharge of floodwaters amounted to a "taking" of PG&E's property. Further, Caltrans argues that, even if inverse condemnation law applies, the court erred in assigning liability to Caltrans, even though both Caltrans, as the upper riparian owner, and PG&E, as the lower owner, acted reasonably.

FACTS AND PROCEDURAL HISTORY

Part of State Route 95, maintained by Caltrans, runs through an area called Lobeck's Pass (the Pass). The Pass is located in a desert area. Rain is not frequent, but rain in the Pass area can cause flooding. Caltrans built some earthen dikes to protect the highway from water damage. PG&E owns a major underground gas supply pipeline in the area.

In 1990, rains damaged the protective dikes and the roadway. Caltrans repaired the roadway and the dikes. Caltrans installed some concrete panels and some rock slope protection to armor parts of the earthen dikes.

In September of 1996, a heavy rainstorm in the Pass again damaged the road. Caltrans closed the road because of mud and debris flows. Some vehicles were stranded by the floodwaters. The floods from the 1996 storm also uncovered portions of the pipeline, and even left some parts in "free span," with neither cover nor support. Some rocks armoring the Caltrans dikes were washed 100 to 200 feet downstream.

After the storm in September of 1996, Caltrans undertook further repairs to reopen and protect the roadway. Among other things, Caltrans reconstructed its dikes, including substantially increased concrete panel and rock slope protection measures.

While Caltrans was undertaking its highway and dike repairs, PG&E asked to meet with Gary Mayer, the Caltrans supervisor of the project, to discuss PG&E's concerns about the effect of the Caltrans repairs on PG&E's pipeline. In one part of the Pass (Location A), PG&E was concerned about narrowing the channel for carrying water. Caltrans agreed to realign its dike to parallel the roadway. At a second location (Location B), where the pipeline crossed under the roadway, PG&E was concerned about erosion because of the pipeline's shallow coverage at that point. Caltrans added rock slope protection and Portland cement concrete grouting to strengthen the remnant of the dike at Location B. At a third point (Location C), the pipeline was near or under one of Caltrans's dikes. PG&E asked Caltrans not to armor the earthen dike at Location C, so that PG&E could more easily access its pipeline for maintenance and repair. Caltrans accommodated PG&E's request and did not replace the rock slope protection on that

dike. PG&E was concerned about erosion at a fourth area (Location D), because its pipeline had only a 12- to 14-inch cover at that location.

PG&E presented evidence at trial that armoring the Caltrans dikes with impervious rock and concrete material would increase the speed and erosive force of floodwaters diverted by the dikes over the land covering the pipeline. PG&E therefore took steps to protect its pipeline, principally at three selected mitigation sites. It installed protective mats, of synthetic and concrete material, subsurface and, in at least one location, also on the surface of the mitigation area. PG&E paid $536,426.23 for its mitigation measures.

Caltrans's expert testified that the dikes repaired in 1996 retained approximately the same footprint as before the storm; the major difference was the placement of the cement-grouted rocks on the rebuilt dikes. As to the rock slope protection, or "riprap" armoring the dikes, at one location the expert opined that the water flows from storms would be the same whether the dike was riprapped or not. At another location, most of the erosion was caused by flows from a side canyon, and noted that the dike in that area was not riprapped in any event. He testified, specifically, that water from the side canyon could be expected to cause sufficient erosion, regardless of the Caltrans facilities, to render the 12 to 20 inches of cover over the pipeline inadequate as engineered. The processes of erosion and deposit of sediment "along an alluvial stream, such as [the Pass], are rules not exceptions. When you . . . put a road on along a water course, you must expect erosion, and you must take preventative measures. What you have taken in

putting riprap on the berms, . . . that is exactly how I, as an engineer, would do." Finally, PG&E, in putting a pipe along an alluvial stream, "must expect erosion. They must have put their pipe either deep enough or [*sic*] protect their pipe, regardless of the highway, regardless of any levees being present."

PG&E initiated this action in January 1998 against Caltrans on theories of inverse condemnation, negligence, and nuisance. Eighteen months later, in July of 1999, PG&E dismissed the causes of action for negligence and nuisance. The case proceeded on the inverse condemnation theory only. The issues of liability and damages were bifurcated.

After hearing the evidence, as outlined above, the trial court determined that a "taking" had occurred. "This is based primarily on the testimony of Dr. Hromadka. His testimony regarding the increased risk of harm to [PG&E's] gas pipeline due to measures taken by [Caltrans] to protect its roadway was convincing. The expert in this area called by [Caltrans] was not. . . . [P]hotographs taken immediately after the September 1996 flood . . . show the destructive nature of the water flow. A future destructive flow will be concentrated in the area of [PG&E's] pipeline. This flow will cause [PG&E's] pipeline to be harmed." The court considered the storm waters to be surface waters, and not waters in a "natural watercourse." Waters coming into and flowing out of the Pass are clearly surface waters, which are spread out and diffuse. Within the Pass itself, the waters are "confined surface water[s]. In a natural state, water would be confined by the hillsides of the Pass. Yet, in the Pass itself, the water would not flow in a channel defined by bed and bank. The water would meander through the Pass. . . . [¶] The dikes

constructed by [Caltrans] are not 'new channels created in the course of urban development through which waters presently flow.' [Citation.] [Caltrans] has not created a 'natural watercourse.' The dikes divert water from the road; they do not create any channel for the water."

The court found that both PG&E and Caltrans had acted reasonably. PG&E was entitled to protect its pipeline after the 1996 storm event showed the risk of harm from a major event; Caltrans's fortification of the dikes would force even more water over PG&E's pipeline right-of-way, increasing the risk of damage. The magnitude of the risk was significant for PG&E's major pipeline. Caltrans was also reasonable. It was reasonable to place the road in the Pass, and "[p]rotecting the roadway from future flooding and damage is valid and reasonable conduct."

Under the findings that the waters were surface waters, and that the conduct of both the upstream (Caltrans) and downstream (PG&E) owners was reasonable, the court applied *Keys v. Romley*,[1] holding that "the injury must necessarily be borne by the upper landowner who changes a natural system of drainage."

After the court's judgment of liability, the parties stipulated that the amount of damage was $536,426.23, the amount PG&E had paid for its mitigation measures. The court entered judgment accordingly. Caltrans now appeals.

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[1] *Keys v. Romley* (1966) 64 Cal.2d 396, 409.

ANALYSIS

I. Standard of Review

Caltrans raises two contentions: first, that the trial court erred in finding that a "taking" had occurred in the alleged absence of any present damage to PG&E's pipeline from Caltrans's latest improvements to the dikes protecting its highway. Second, Caltrans argues that the trial court erred in relying on *Keys v. Romley*[2] in finding Caltrans liable as the upper owner, even though Caltrans had acted reasonably. While some of the predicates to the court's rulings are based upon factual matters (e.g., evidence of the parties' conduct), the questions we are called upon to answer present largely legal determinations. Accordingly, we will examine the questions de novo.[3]

II. PG&E Has Suffered No Damage As a Result of Caltrans's Conduct

Caltrans first contends that the trial court erred in entering an inverse condemnation judgment in favor of PG&E, because PG&E has as yet suffered no cognizable damage from Caltrans's actions of armoring its protective dikes with rock slope protection and concrete grouting.

As the trial court noted in its judgment, this case is peculiar: "[I]n comparison to other cases involving water flow and inverse condemnation, this is one 'through the

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[2] *Keys v. Romley*, *supra*, 64 Cal.2d 396.

[3] *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 601; *San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc*. (1999) 73 Cal.App.4th 517, 528.

looking glass.' The subject of the dispute is an area where rain and water flow is an abnormal event. The plaintiff and defendant are not literally upstream or downstream from the other, but parallel. The plaintiff's complaint is not that the dikes built by the defendant failed, but that they won't. The damage from the water flow is predicted, it has not yet physically occurred."

The court's last observation is the determinative one.

California Constitution, article I, section 19, provides: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner. . . ." The Fifth Amendment of the United States Constitution also prohibits "taking" of private property by the government without "just compensation." These constitutional provisions are the basis for actions both in eminent domain, in which the governmental entity assumes title and ownership of the property, and in inverse condemnation, in which property might not be actually appropriated by the government, but in which governmental action may invade the property, or may damage the property without physical invasion.[4]

"To prevail in an action for inverse condemnation, a claimant must prove that a public entity has taken or damaged his or her property for public use. [Citation.] Physical injury to real property is compensable when it is proximately caused by a public improvement '"as deliberately designed and constructed."' [Citation.] The injury need

not be foreseeable, but the public improvement must be a substantial cause of the injury. [Citation.]"[5] The problem here is "damage." As the trial court acknowledged, Caltrans's conduct in reinforcing its protective dikes has not yet damaged PG&E's pipeline.

PG&E asserts that the "damage" consists of its costs in protecting its pipeline from anticipated flooding. It further argues that, "physical damage to property is not invariably a prerequisite to compensation."[6] The cases holding that physical damage is not a prerequisite are distinguishable. The lead case, *Varjabedian v. City of Madera*,[7] involved noxious odors. *Breidert v. Southern Pac. Co.*[8] concerned the closing of a roadway, effectively creating a cul-de-sac, and restricting access from property to the public roads, but no invasion of the property itself. *Southern Cal. Edison Co. v. Bourgerie*[9] classified an intangible property right, the existence of a deed restriction, as a kind of property for which a governmental entity would have to pay compensation; of course, in *Southern Cal. Edison Co. v. Bourgerie*, the property was itself taken for a

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[4] *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 940.

[5] *Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 555.

[6] *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 296 [objectionable odor from sewage treatment plant], citing *Breidert v. Southern Pac. Co*. (1964) 61 Cal.2d 659, [closing an adjacent public street] and *Southern Cal. Edison Co. v. Bourgerie* (1973) 9 Cal.3d 169 [compensation must be paid for violation of a restriction upon property, e.g., a taking to build an electric generator on property which contains a deed restriction that the property shall not be used for an electric generator].

[7] *Varjabedian v. City of Madera*, *supra*, 20 Cal.3d 285.

[8] *Breidert v. Southern Pac. Co.*, *supra*, 61 Cal.2d 659.

public purpose -- the construction of an electric generation plant -- from which use the private property owner was precluded by the restriction. In each of these cases -- noxious fumes from an adjacent property, the loss of street access, the abrogation of a deed restriction -- the damage (1) did not consist of a physical invasion of the property itself, and (2) had already occurred.

Here, by contrast, the risk of harm, and the entire reason that PG&E took its mitigation measures, is the risk of actual physical damage to PG&E's pipeline. This risk has, however, not as yet materialized. This issue was squarely addressed in *Jordan v. City of Santa Barbara*,[10] which we find controlling on the point: "'[t]he very definition of a "taking" requires an "act" . . . , and the risk of future flooding is not an act.'"[11]

Because PG&E is unable to show any present damage, but only a risk of future flooding, we hold there has been no act of "taking" by Caltrans's conduct in reinforcing its protective dikes.

To the extent that PG&E argues that its damage consists of the mitigating measures it took, in placing the protective mats over the most vulnerable sections of its pipeline, we are not persuaded. First, and fundamentally, as we have seen, the real risk is

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[9] *Southern Cal. Edison Co. v. Bourgerie*, *supra*, 9 Cal.3d 169.

[10] *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245.

[11] *Jordan v. City of Santa Barbara*, *supra*, 46 Cal.App.4th 1245, 1257, quoting *Olson v. County of Shasta* (1970) 5 Cal.App.3d 336, 341.

physical damage to the pipeline from future flooding which has not yet occurred. There has been no taking.

Second, PG&E's actions in covering its pipeline with protective mats are the same actions that it was required to take to show it had behaved reasonably, as a downstream property owner. Under the applicable principles of water law, both the upstream owner and the downstream owner are required to act reasonably: "Today a landowner's conduct in using or altering the property in a manner which affects the discharge of surface waters onto adjacent property is subject to a test of reasonableness."[12]

The trial court found that PG&E had acted reasonably in installing the protective mats. This finding was supported by the evidence and is itself reasonable. What PG&E seeks to do, however, is to charge *Caltrans* with the cost of PG&E's duty to behave reasonably. This it may not do. Suppose, for example, that PG&E had done nothing, given its knowledge of the already-existing and natural erosive force of the floods that can occur in the Pass. If a storm then caused damage to PG&E's pipeline, after Caltrans had armored its dikes with rock slope protection and concrete grouting, PG&E would be unable to argue the taking issue, because it would have failed to act reasonably in view of the known risks.

The same result obtained in the prominent California Supreme Court case, *Locklin v. City of Lafayette*, *supra*. In *Locklin*, several upstream property owners, including a

number of public entities, had made improvements which caused surface water runoff into a natural waterway to increase. The increased flow in the natural waterway eroded the banks of the stream on the property of some downstream owners. The court ultimately held that the downstream owners could not recover in inverse condemnation for the loss of property, i.e., damage from erosion of the stream bank, because they had adduced no evidence that they had acted reasonably themselves to protect against already-existing risks.[13] "Reasonableness in this context also considers the historic responsibility of riparian owners to protect their property from damage cause by the stream flow and to anticipate upstream development that may increase that flow."[14] PG&E's costs of mitigation were part and parcel of their own obligation of reasonableness, to show that they "acted reasonably to protect their properties from stream-caused damage."[15] We decline to equate PG&E's own duty of reasonableness with "damage" for purposes of inverse condemnation. For this reason also, therefore, we conclude that PG&E suffered no cognizable damage which could amount to a taking for purposes of inverse condemnation.

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[12] *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 351.
[13] *Locklin v. City of Lafayette*, *supra*, 7 Cal.4th 327, 361.
[14] *Locklin v. City of Lafayette*, *supra*, 7 Cal.4th 327, 369.
[15] *Locklin v. City of Lafayette*, *supra*, 7 Cal.4th 327, 361.

DISPOSITION

Because PG&E suffered no damage as a result of Caltrans's conduct in armoring its protective dikes with grouted riprap, there has been no cognizable taking. The trial court therefore erred in giving judgment in inverse condemnation for PG&E. Because the issue of damages is dispositive of the inverse condemnation cause of action, we need not and do not address Caltrans's further contention that the trial court erred in applying *Keys v. Romley*[16] to find Caltrans liable in inverse condemnation, notwithstanding the reasonable conduct of both parties.

The judgment is reversed. In the interests of justice, each party is to bear its own costs on appeal.

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/s/ Ward
J.

We concur:

/s/ Hollenhorst
Acting P. J.

/s/ Richli
J.

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[16] *Keys v. Romley*, *supra*, 64 Cal.2d 396.